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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

NO. 1080

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

vs.

ROOT REFINING COMPANY,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

J. BERNHARD THIESS,
THORLEY VON HOLST,
pro se, and on behalf of
Skelly Oil Company;
Globe Oil & Refining Company (of Illinois),
Eldorado Refining Company,
Globe Oil & Refining Company (of Kansas),
Rock Island Refining Company, and
Anderson Prichard Oil Company.

SIDNEY NEUMAN,
ROBERT W. POORE,
Of Counsel.

THE TWENTIETH CENTURY PRESS, INC., CHICAGO

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

UNIVERSAL OIL PRODUCTS COMPANY, *Petitioner*, *vs.* ROOT REFINING COMPANY, *Respondent.*	No. 1080.

MOTION FOR LEAVE TO FILE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

J. Bernhard Thiess and Thorley von Holst, members of the bar of this Court, respectfully move this Honorable Court for leave to file herein, and also in opposition to petitioner's motion for leave to file a similar petition under §262 of the Judicial Code (28 U. S. C. §377), the hereinafter appearing Brief in Opposition, and for grounds of their Motion they say:

1. They were attorneys for the defendant Root Refining Company in the above entitled cause at all times up to January, 1939, when said defendant took a license under petitioner's patents, and made a settlement for alleged past infringement.

2. They are the parties named in the order of the Court of Appeals for the Third Circuit entered December 29, 1944, directing petitioner to pay to them as costs, fees and expenses the sum of $154,606.57, this order being that to which the present petitions are directed.

3. They initiated the proceedings held in the Third Circuit Court of Appeals to determine whether its previously entered judgments of June 26, 1935, were invalid because

tainted with fraud, their appearance throughout said proceedings being as *amici curiae* in the public interest, and also on behalf of the corporations whose names are subjoined, and who were adversely affected by the said fraudulent judgments by reason of petitioner's assertion against them of said judgments as binding adjudications in actions in which they were sued for infringement of the same patents upheld by the said fraudulent judgments, all as appears more fully in the said Brief which they ask leave to file.

4. They were served with a copy of the petition, brief, and record filed by petitioner under §240 (a) of the Judicial Code, but have not been served in connection with petitioner's motion for leave to file a similar petition under §262 of said Code.

5. They are not advised whether this motion is necessar in view of their direct interest as aforesaid, but as they are not named as respondents, and as Root Refining Company, which alone is so designated, is not opposing the petitions herein, and did not participate in the proceedings had in the Circuit Court of Appeals for the Third Circuit which the petitioner seeks to have reviewed, they present the motion in order that no step may be omitted that might be deemed a condition to their being heard in this Court.

J. BERNHARD THIESS,
THORLEY VON HOLST,
pro se, and on behalf of
Skelly Oil Company,
Globe Oil & Refining Company (of Illinois),
Eldorado Refining Company,
Globe Oil & Refining Company (of Kansas),
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OCTOBER TERM, 1944

No. 1080

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

vs.

ROOT REFINING COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This Brief is submitted by, and on behalf of, J. Bernhard Thiess and Thorley von Holst, *pro se*, and on behalf of certain oil refining companies (not including Root Refining Company) whose names are subjoined, and whose interest will hereinafter appear.

Universal Oil Products Company has filed its petition and supporting brief herein under Section 240 (a) of the Judicial Code (28 U. S. C. §347), and has also asked leave to file an identical petition and brief, presenting identical questions and the same narrow issue, under Section 262 of said Code (28 U. S. C. § 377). We question the propriety of the latter proceeding, as it is our understanding that if is never in order, save where a petition cannot be filed under Section 240 (a). *United States* v. *Beatty*, 232

U. S. 463, 467; *In re 620 Church St. Corp.*, 299 U. S. 24, 26. However, we ask that this Brief in Opposition be considered as applicable in both proceedings.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals, filed December 29, 1944, is reported at 147 F. (2d) 259 and will also be found in the record beginning at page 3685 of Volume IX.

The report of the special master, finding the former judgments of the Court below tainted and invalidated by fraud, is not reported but will be found in Volume VIII of the record, at pages 3516 to 3614.

The order of the Circuit Court of Appeals adopting the master's report and vacating the former judgments entered on June 26, 1935, is reported only at 62 U. S. P. Q. 114 and will be found in Volume IX of the record, at page 3661.

STATEMENT OF THE CASE.

On March 11, 1929, Universal Oil Products Company, a patent licensing corporation operating in the oil refining industry,* filed its bill of complaint for infringement of Egloff patent No. 1,537,593 against Root Refining Company, a Delaware corporation. In 1931* the same plaintiff

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*In that year petitioner's stock was acquired by the Royal Dutch Shell group, the Standard Oil Company of California, and the Atlantic Refining Company. These companies retained the stock until its acquisition by The Guaranty Trust Company as Trustee for the American Chemical Society, which did not occur until the fall of 1944—after the Court of Appeals had found petitioner guilty of fraud in the *Root* case. Petitioner will be sometimes hereinafter called "Universal." Root Refining Company will be referred to as "Root."

brought another suit against the same defendant on Dubbs patent No. 1,392,629. Both patents related to oil cracking processes. The accused process was that carried on in a still designed by two engineers, Louis E. Winkler and Fred C. Koch, operating independently of the large oil refining corporations. This still is known in the industry as the "Winkler-Koch" still.*

In the summer of 1932 the two cases (hereinafter sometimes called "the *Root* case") were tried as consolidated causes, and judgment being for Universal, appeals were taken to the Court of Appeals for the Third Circuit. Briefs were filed and the cases were argued on January 7, 1935, before Judges J. Warren Davis, Joseph Buffington, and J. Whitaker Thompson.

On June 26, 1935, the Court of Appeals rendered a decision of affirmance. The opinion was written by Judge J. Warren Davis. The decision and judgments entered thereon were nullities because corruptly obtained by means of Universal's bribery of Judge Davis. At the time, no one, save the guilty parties, knew, or had any means of knowing, of the fraud. Hence, the cases proceeded as though the judgments were valid.

Petitions for rehearing to the Court of Appeals, and for certiorari to this Court, were presented and denied, and in the fall of 1935 the apparently valid mandates of the Court of Appeals went down to the District Court.

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*Although accused of patent infringement by almost all the large patent holding oil companies, this Winkler-Koch still has finally been cleared of the charge in four infringement suits, to-wit, *Universal Oil Products Company* v. *Globe Oil & Refining Company*, 322 U. S. 471; *Gasoline Products Company* v. *Champlin Refining Company*, 86 F. (2d) 552; *Standard Oil Company* v. *Globe Oil & Refining Co.*, 82 F. (2d) 488; and *The Texas Company* v. *Anderson-Prichard Refining Corporation*, 122 F. (2d) 829.

Thereafter, Universal, in six other cases which it had pending (Vol. I, pp. 31-2) against other users* of Winkler-Koch stills for infringement of the Dubbs and Egloff patents, amended its pleadings to set up the judgments of the Court of Appeals in the *Root* case as *res judicata* on the theory that all these defendants had participated in, and had controlled, the defense of the *Root* case, and were therefore bound by the decrees therein after affirmance by the Court of Appeals. In the first of these other cases that came to trial the District Court at first held for Universal on this issue (*Universal Oil Products Company* v. *Globe Oil & Refining Co.*, D. C., N. D. Ill., 27 F. Supp. 161). The facts upon which Universal based its contention are reflected in the cited opinion.

Reverting now to the *Root* case, after the mandates went down, a master had been appointed to hear the accounting, and a statement of account had been filed. However, in January, 1939, Root made a settlement** with Universal by the terms of which Root paid a sum of money in satisfaction of past infringement, and accepted a license under all of Universal's patents. Nevertheless, the *Root* case was not dismissed, for the settlement agreement forbade its

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*Namely, Skelly Oil Company, Globe Oil & Refining Company (of Illinois), Omar Refining Company, Eldorado Refining Company, Globe Oil & Refining Company (of Kansas), and Rock Island Refining Company. In its action against one user, Anderson Prichard Oil Company, Universal merely set up the *Root* judgments as judicial precedents. Upon the discovery of the first suggestions of fraud in the *Root* case, these seven companies through their attorneys, initiated the proceedings which ultimately led to the uncovering of the fraud (*post*, pp. 8-10).

**Root settled its case in ignorance of the fraud which Universal had perpetrated upon it, upon the Court of Appeals, and upon the public, by its bribery of Judge Davis.

dismissal without the consent of both parties.* The case has not been dismissed to this day. The purpose in keeping it alive was to prevent the defeat of Universal's claim of *res judicata* in the six other cases in which the *Root* judgments had been set up as binding on the defendants. Universal knew that a decree of dismissal would nullify the judgments on which it was relying as *res judicata*, and hence it prevented the entering of such a decree. But in preserving the *Root* judgments for purposes of *res judicata*, Universal also preserved the jurisdiction of the court to take any appropriate action at any time in the *Root* case.** However, being advised of Root's settlement, the District Court in the *Globe* case in the Seventh Circuit held that Globe was no longer bound (31 F. Supp. 665), with the result that the *Globe* case ultimately found its way to this Court on the apparent conflict with the ostensibly valid judgments in the *Root* case (*Universal* v. *Globe*, 322 U. S. 471).

While the *Globe* case was pending before the District Court, and while *res judicata* based on the *Root* judgments

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*The agreement provided (Vol. I, p. 7) that "Neither the Root or Universal of Delaware shall take any further action or proceeding in such suits of any kind or nature whatsoever without first obtaining the written consent thereto of the other, and all proceedings, other than those referred to in the first sentence of this paragraph [*i.e.*, the accounting and a petition to reopen then pending] heretofore had in such suits, or either of them, shall remain unaffected by this agreement."

**Universal's counsel urged this point at the preliminary hearing on the question of fraud (Vol. I, p. 27):

> Judge Haight: "* * * you understand the minute Root stops paying royalties, then the decree would become effective if we wanted to make it effective, and the injunction would go against him, so there is still an outstanding decree, * * *"

was still an issue in the other five cases,* the attorneys representing all the users of Winkler-Koch stills who had been sued by Universal on the Dubbs and Egloff patents learned for the first time, in May, 1941, at the criminal trials of Judge J. Warren Davis and one Morgan Kaufman, an attorney, both of whom had been indicted in the Eastern District of Pennsylvania for obstructing justice in the Fox bankruptcy cases, that Kaufman, who was the go-between in the Fox cases, had also been attorney for Universal in the *Root* case, and had been paid a large sum of money therein, supposedly as a "retainer."** Sensing that a like fraud might well have been perpetrated in the *Root* case, these attorneys (the late Arthur C. Denison of Cleveland, and J. Bernhard Thiess and Thorley von Holst of Chicago) appeared, on June 5, 1941, before the Third Circuit Court of Appeals, sitting *en banc*, and suggested that the question of possible fraud in the *Root* case be investigated. In their notice to Universal of their intention to appear before the court, these lawyers stated that their appearance would be (Vol. I, p. 3) "on behalf of certain companies, including Globe Oil & Refining Company and Skelly Oil Company, against whom the decision in the said case of *Root Refining Company* v. *Universal Oil Products*

*It would also have been an issue on appeal in the *Globe* case but for the discovery, in the *Root* case, of facts suggesting fraud prior to the time that an appeal was taken in the *Globe* case, which led Universal to stipulate that the issue would not be raised on appeal in the latter case (Vol. I, p. 61, Paragraph II of Answer).

**Petitioner's statement (Petition, p. 7) that it was divulged at the criminal trials that it paid the sum of $25,000.00 as a general retainer for the years 1932, 1933, 1934 and a part of 1935 is not correct, in so far as it nowhere appeared in the criminal trials how much Kaufman was paid. On the fraud issue in the *Root* case, it was shown for the first time that petitioner paid Kaufman $25,000.00 in that case on October 22, 1935—the day following denial by this Court of Root's petition for certiorari. It was also shown that in the following year petitioner paid Kaufman an additional $25,000.00, ostensibly in other cases, but which would not have been paid to him but for what he had done in the *Root* case. Thus, the price of corruption to petitioner was $50,000.00.

Company is being asserted as *res judicata* and as a judicial precedent."

At the informal preliminary hearing held on June 5, 1941, pursuant to this notice, Judge Denison suggested that, in view of Root's settlement, the case had become moot. However, petitioner's counsel strenuously urged the contrary view, saying (Vol. I, p. 18) "Judge Denison, I think, is wrong in saying that there has been a complete settlement of the *Root* case. The decree that was made is still outstanding, and that decree carries with it an injunction and an order for an accounting. The accounting was settled, a license was taken, so I take it that the case is still alive."

Thereafter, on leave of court first obtained, a petition *amici curiae* was filed by Messrs. Denison, Thiess and von Holst.* Paragraph II of that petition (not traversed by Universal, and therefore admitted) states (Vol. I, p. 30) that the request to the court to take action rests, "*First* upon their status as officers of this Court, and second, upon the threat to the interests of the defendants in the other cases hereafter listed," the threat being the assertion, against those defendants, of the court's opinion in the *Root* case as a judicial precedent, and of its decrees as *res judicata*. In paragraph V (Vol. I, pp. 31-33) the defendants listed in the other cases are the same companies as those whose names are subjoined to this Brief (with the exception of Omar Refining Company, now out of business), where also are stated the facts as to the assertion against them of said judgments, and in paragraph VI (Vol. I, p. 33) it is alleged that petitioners are attorneys for each of said companies. Universal's answer (Vol. I, pp. 61-2) admits these allegations of the petition with a qualification as to the *Globe* case.

*Arthur G. Logan, Esq., also filed a petition as *amicus curiae*. He did not, however, take part in subsequent proceedings. Hereinafter, reference to *amici curiae* shall designate Messrs. Thiess and von Holst, and Judge Denison until the date of his death.

Paragraph III of the petition (Vol. I, p. 30) states that the jurisdiction of the Court of Appeals "rests upon the inherent power of the Court at any time to examine into the suggested existence of fraud and corruption affecting and tainting any former action of such Court."

The prayer of the petition (Vol. I, pp. 44-6) after making various requests as to procedure, asks in paragraph 3 thereof,

> "That the Court make such other or further order in the premises, either in its own interest thereon, or for the benefit and relief of the petitioners, in respect of their collateral interests as set forth in Paragraphs V and VI herein, as to the Court shall seem meet and proper."

On November 26, 1941, the Court of Appeals for the Third Circuit (Judges Biggs, Maris, Clark, Jones and Goodrich) entered an order in the *Root* case (Vol. I, p. 94) appointing a special master to inquire into the question of whether the judgments on appeal in that case were invalid by reason of fraud. The order provided, *inter alia*, that the master issue subpoenas "on the request of the parties interested in the above entitled causes, upon the request of the said *amici curiae*, or upon his own motion; * * * that he shall examine witnesses himself or permit them to be examined and cross-examined by the parties interested in the said causes and by the said *amici curiae*." The order also provided (Vol. I, p. 96) that costs should be paid in the first instance by *amici curiae* and "shall be ultimately taxed against the said *amici curiae* or the said Universal Oil Products Company" as the court might direct, and that the master might require the *amici curiae* "to deposit with him a reasonable sum or sums" as indemnity in respect of his expenses and compensation."

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*The sums thus deposited by *amici curiae* and ultimately allowed the master as fees totaled $25,000.00.

The proceedings before the master were throughout of an adversary nature. The status of those designated as *amici curiae* bore a dual aspect—first, as friends of the court to aid it in ascertaining whether a fraud had been committed in the *Root* case, which, if established, would require the dismissal of the bills of complaint on the ground of unclean hands, regardless of Root's inaction; and second, as representing their other clients, to uncover the fraud and prevent its perpetuation in other cases in which the *Root* judgments had been asserted as *res judicata*.*

Extensive hearings, extending from December, 1941, to March 4, 1943, were held before the master and attended by petitioner's counsel, and thirty-two witnesses were called and examined by *amici curiae* with the right of

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*Counsel for Universal repeatedly insisted that the proceedings before the master were adversary in character because of *amici's* representation of parties who were being sued by Universal. A specimen of an oft-repeated premise is the following (Vol. I, p. 133):

> Mr. Harris (of counsel for Universal):
>
> "Now, we must be realists. We all live in a real world, and while these gentlemen are called amici curiae, the Court couldn't call them anything else. We don't say that they are going to be unfair, but they are obviously here in the business of clients, and just not to recognize that fact would not be to recognize the reality of the situation, and I mean nothing else. I have the highest esteem for all of them, and I won't be angry no matter what they say about me.
>
> "The Master: Well, I think as realists we must recognize, of course, that you gentlemen on either side have private interests that you are serving as well as the public interest."

Indeed, petitioner still insists before this Court that *amici curiae* are such in name only. Thus it says (Petition, p. 42) "In the present investigation *Amici Curiae* concededly represented private interests, not parties to the *Root* case. * * * It is to these clients, in whose interests *Amici Curiae* instituted this investigation, that the latter must look for compensation."

The adversary nature of the proceedings was also recognized by the master and by the Court of Appeals in adopting his report. The master held that (Vol. VIII, p. 3596) "While, technically, amici may not be parties, they were acting in part on behalf of their clients and the interests of their clients and the interests of Universal were adverse."

cross-examination extended to, and freely exercised by, petitioner's counsel. The former testimony of five additional witnesses was stipulated into the record. Four thousand four hundred and seventy-nine typewritten pages of testimony were taken and transcribed, and two hundred and eighty-eight exhibits were admitted in evidence. Petitioner called no witnesses on its behalf, although it had the privilege of so doing. The hearings were conducted as a regular judicial proceeding. Objections to evidence were interposed and were ruled on by the master, (as examples, see the master's report, Vol. VIII, pp. 3519 and 3531; also Vol. I, p. 212; Vol. II, p. 439, and pp. 505-11; Vol. III, p. 1475). The proofs were in large part elicited from hostile and unwilling witnesses who were themselves parties to the fraud. In view of this situation, and in the exercise of his discretion, the master, on the suggestion of *amici curiae*, held that examining counsel on both sides should not be bound by the answers of witnesses whom they called.*

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*It was in this connection that the master made the remark so much emphasized by petitioner to the effect that the investigation should not be conducted strictly according to the rules of evidence. This appears from the following (Vol. I, pp. 133-4):

> "I do not think that the investigation—for that is all it is—should be conducted strictly according to the rules of evidence in litigation. I certainly do not feel that either party should be bound by the statements of witnesses that they call, as very often, certainly, they will be adverse witnesses in a sense.
>
> "As regards the examination, itself, whether it should be cross-examination or not, I think we can control that as we come to it. I don't think that is a very serious thing one way or the other. But I do think that its being an investigation, no one should be considered bound on either side if a witness makes an unexpected reply, which sometimes does happen."

Petitioner's statement (Petition, p. 19) that the master's remark occurred "following . . . statements of objection to jurisdiction" is misleading. The remark followed the suggestion (Vol. I, p. 130) that *amici curiae* should be allowed to examine adverse witnesses "as though under cross-examination" and it was in this respect that the master ruled that the strict rules of evidence should not apply.

At the close of the hearings both sides filed briefs, and on October 19, 1943, the master filed his report (Vol. VIII, pp. 3516-3600) finding that the judgments entered on June 26, 1935, by the Court of Appeals were fraudulently obtained by petitioner through the bribery of Judge Davis, a member of that court.

Thereupon, petitioner filed with the Court of Appeals one hundred and sixty-five objections and exceptions to the master's report (Vol. VIII, pp. 3615-3637). In not one of these did it complain of the master's rulings on evidence, or of the manner in which the proceedings had been conducted.

The case was briefed and argued by both sides before the Court of Appeals, and on June 15, 1944, the Court entered an order adopting the master's findings and conclusions (Vol. IX, p. 3661). This order vacated the judgments entered on June 26, 1935, recalled the mandates, and directed that the cases be restored to the argument list for reargument.* The fact of fraud was thereby finally and conclusively established. But the court retained jurisdiction thereafter to make formal disposition of the case. In view of the fraud, the final judgment, when entered, must necessarily be that the decrees of the District Court be reversed and the bills of complaint be dismissed for unclean hands.

Petitioner filed no petition for rehearing, and made no application to this Court for a writ of certiorari to review the order of June 15th finding it guilty of fraud.**

*Petitioner emphasizes (Pet., p. 23) that "The causes have never been reargued," but fails to inform this Court that the reason therefor is that following upon the order of June 15, 1944, petitioner and Root, on August 3, 1944, entered into an agreement which superseded the agreement of April 1, 1939, and settled all controversies between the parties, including Root's claim for damages because of petitioner's fraud.

**Petitioner acknowledges (Pet. pp. 4-5) that, should the writ now be granted, not the question of fraud, but only the "narrow" question of jurisdiction, will be presented to this Court.

The entire expenses of the fraud proceedings, including the fees of the special master and of Messrs. Denison, Thiess and von Holst, and their associates, had been paid by those oil refining companies who had instigated the investigation in 1941 to protect themselves against petitioner's assertion against them of the fraudulently-obtained *Root* judgments. Accordingly, on or about July 24, 1944 (before petitioner's final settlement with Root), said attorneys submitted their bill of costs and expenses (Vol. IX, p. 3663), which, with certain reductions, was approved by the Court of Appeals on December 29, 1944, in the sum of $154,606.57 (Vol. IX, pp. 3685, 3692). If, and when, recovered from petitioner, this sum will be paid over to the aforesaid oil refining companies as reimbursement for their initial expenditures.

On January 17, 1945, the Clerk of the Court of Appeals, Mr. William P. Rowland, sent a letter to counsel for petitioner in which it was stated that the court directed him to inform counsel that "perhaps it might be appropriate to direct the court below to dismiss the complaints on the ground that the plaintiff came into this Court with unclean hands"—a suggestion first made to the Court in the brief filed by *amici curiae* on June 25, 1941 (Vol. I, pp. 53-4). No further action has been taken by the Court of Appeals looking to the final disposition of the *Root* case, for the reason that proceedings therein are suspended pending the outcome of Universal's petition for certiorari to this Court.

QUESTION PRESENTED.

The only question presented here is whether a Circuit Court of Appeals has jurisdiction to inquire into the question of possible fraud in its own interlocutory judgment rendered in a patent case which is still pending in the District Court, although the issues of patent validity and infringement were settled after the perpetration of the fraud, and although the defendant against whom, in part, the fraud was directed, declines to take any action to uncover it, and whether, upon finding that the judgment was in fact obtained by bribery of a member of the court, that court may set aside the judgment as a nullity, and assess costs against the guilty party. It being established in *Hazel-Atlas Glass Company* v. *Hartford-Empire Co.*, 322 U. S. 238, that a court of appeals has such jurisdiction upon motion of a party to the cause, and it being fundamental law that in a matter of this kind, where its own integrity is at stake, the court may act *sua sponte*, or on motion of anyone adversely affected by the fraudulent judgment, it follows that this question is resolved in the affirmative, without conflict with precedent, and without presenting for consideration any new question of law.

ARGUMENT.

The Court of Appeals Had Jurisdiction to Act in the Instant Proceedings.

The power and jurisdiction of a court of appeals to entertain appropriate proceedings, and to receive evidence, showing that a fraud has been committed in, or upon, that court, and thereupon to vacate its fraudulently induced judgment, and to recall the mandate which issued thereon, even though the term at which the judgment was entered and the mandate was issued had long since expired, is directly affirmed by this Court's decisions in *Hazel-Atlas Glass Company* v. *Hartford-Empire Co.*, 322 U. S. 238, and *Shawkee Manufacturing Co.* v. *Hartford-Empire Co.*, 322 U. S. 271. These decisions, which are ignored in petitioner's brief, establish that the procedure followed by the Court of Appeals in unearthing the fraud in the *Root* case is in harmony with the fundamental principles of jurisdiction in cases involving fraud as enunciated and applied by this Court, and by other courts, in *Noonan* v. *Bradley*, 79 U. S. 121, at 129, *Tyler* v. *Magwire*, 17 Wall. (U. S.) 253, at 283, *Art Metal Works, Inc.* v. *Abraham & Straus, Inc.*, 107 F. (2d) 940 (C. C. A. 2), and *Rowland* v. *Kreyenhagen*,* 24 Cal. 52; 84 A. L. R. 595. To the same effect is *Black on Judgments* (2d Edition), Section 391. 370

The *Hazel-Atlas* case further establishes that it is an immaterial circumstance that the issues of patent validity and infringement, which existed between petitioner and

*In the *Rowland* case, the California court expressed its view of the principle involved as follows:

> "* * * In contemplation of law, an order obtained upon a false suggestion is not the order of the court, and may be treated as a nullity. If, under color of such an order, the proceedings have in part found their way back to the court below, yet in law they are considered as still pending in the appellate court, and that court may take such steps as may be necessary to make the fact and law agree."

Root at the time of the fraudulent judgments, were settled by agreement prior to the discovery of the fraud.*

Had Root itself made application to the Court of Appeals, raising the question of fraud, as did Hazel-Atlas in its case, all questions of jurisdiction of the Court of Appeals to act would be resolved by this Court's decision in that case. It is plain, therefore, that Universal's position depends wholly upon its point that Root's failure to initiate and prosecute an investigation makes the court powerless to vindicate its own integrity. However, the court acts to devitalize a fraudulently begotten judgment, not only on the motion of an original party and to further his interest; it may also act, *sua sponte*, or on application, to protect its own conscience, or on application to protect the rights of anyone whose interests are adversely affected by the judgment. Root's inactivity removes neither the necessity nor the ability of the court to act in either interest.

The situation thus has two aspects, (a) the court's inherent power to investigate the question of fraud in its judgment, and (b) the court's equitable jurisdiction to entertain a petition on behalf of parties adversely affected by a fraudulent judgment, and to afford such relief in the premises as right and justice require.

(a) The Court Has Inherent Power to Determine Fraud in Its Judgments.—The *Root* case was brought to the Court of Appeals, in 1934, by a duly perfected appeal, and the appeal was never adjudicated by a valid judgment

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*Petitioner erroneously asserts that the *Root* case having become moot, the Court below was powerless to enter any binding decree "even upon the application of Root" (Petition, p. 37). Hazel-Atlas and Hartford-Empire, like Root and Universal, made a settlement subsequent to the fraudulent judgment. Hazel-Atlas discharged its liability by paying $1,000,000.00 and by taking a license under Hartford's patents. In the instant case, Root, in consideration of future payments, was discharged of its liability and took a license under petitioner's patents. In these respects both cases were equally moot.

of that court. No formal disposition has yet been made of the case because of the pendency of the proceedings in this Court, but it is the duty of the Court of Appeals—as it has already indicated—to dismiss the complaints for unclean hands. As Mr. Justice Black stated in the *Hazel-Atlas* case, 322 U. S. 238 at page 250:

> "Since the judgments of 1932 therefore must be vacated, the case now stands in the same position as though Hartford's corruption had been exposed at the original trial."

When the appeals were perfected by Root, there was then pending before the Court of Appeals a case or controversy within the meaning of the Constitution. In that case the Court of Appeals on June 26, 1935, rendered what on its face appeared to be a valid decision, and thereafter took what appeared to be judicial action in entering judgments and in sending down its mandates. In consequence of that apparently valid decision, Root, in 1939, took a license from petitioner, but the settlement agreement expressly provided that the case should not be terminated.* While it was still apparently pending in the District Court, the Court of Appeals, after a full hearing in which petitioner participated, determined that its judgments, and the going down of its mandates, were utter nullities having no legal effect whatsoever because tainted with fraud. This determination restored the case to the stage to which it had progressed before the apparent decision of June 26, 1935, and before Root's 1939 settlement—a stage at which no one questions that a justiciable case or controversy was before the Court of Appeals. At that time the wrong per-

*The qualified nature of the settlement has significance in that it evidences an understanding by the parties, and a desire to have it so, that the action should remain pending, that jurisdiction of the parties should continue, and that the judicial power should remain available to them.

petrated was against the Court of Appeals itself, against the public, and also against the defendant Root, which had not then settled any issue in the case. But had an honest member of the court then discovered the fraud, the court's power and jurisdiction to set aside the judgments would have been in no wise dependent on Root's willingness to act. A case or controversy was pending before it and the court could have taken action to protect its integrity by setting aside the fraudulent judgments. That jurisdiction and power was not lost, nor was its exercise any different in effect, merely because the fraud was not discovered until after Root had placed itself in a position where it did not care to act.

Tampering with the administration of justice involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. The preservation of the integrity of the judicial process does not depend upon the diligence of litigants; the agencies of public justice are not so impotent that they must always be mute and helpless victims of fraud. *Hazel-Atlas Glass Company* v. *Hartford-Empire Co.*, 322 U. S. 238, 246. Nor can their interests be subordinated to the private interests, based on mere business expediency, of a litigant.

It is necessary legal doctrine that Root's settlement could have no effect whatever to defeat the jurisdiction of the Court of Appeals as to matters directly affecting the court's integrity *and of which it had jurisdiction prior to the settlement.* The appeals were never disposed of by a validly constituted court, and despite Root's failure to raise the issue of fraud, the Court will, if necessary, always do so *sua sponte.* Finding the issue in the affirmative, the Court has jurisdiction and power to carry this finding into legal effect by vacating the former judgments as nullities

(which it has already done by its order of June 15, 1944) and directing the dismissal of the cases for unclean hands (which it is prepared to do as soon as the proceedings in this Court are disposed of).

The application of the maxim of clean hands is not a matter of defense to be considered only when urged by a party pursuant to a proper pleading. The maxim is invoked by the court itself, and on its own motion, to protect the conscience of the chancellor and the integrity of the court. *American Insurance Company* v. *Lucas*, 38 F. Supp. 896, 921 (D.C. W.D. Mo.), affirmed 129 F. (2d) 143, (C. C. A., 8) certiorari denied 317 U. S. 687; *Ford* v. *Caspers*, 42 F. Supp. 994, 998 (D. C. N. D. Ill.), affirmed 128 F. (2d) 884 (C. C. A. 7); *Memphis Keeley Institute* v. *Leslie E. Keeley Co.*, 155 Fed. 964, 974 (C. C. A. 6).

The inherent power of a court to nullify the effect of a fraud upon it is well expressed by Circuit Judge Stone in the opinion of the statutory three-judge court, on motions for new trials, in the cases reported *sub nomine*, *American Insurance Company* v. *Lucas*, 38 F. Supp. 926 (affirmed 129 F. (2d) 143, where jurisdiction was not attacked; certiorari denied, 317 U. S. 687). The facts in those cases, also involving bribery of a public official and fraud upon the court, are shown by the court's original opinion, 38 F. Supp. 896. On the jurisdictional question, the court in part said (38 F. Supp. 926, at p. 931):

> "* * * So long as there remains anything which a court can do in a particular litigation to protect its integrity, we think it has the power to act: provided only, that such action is based upon a full opportunity for hearing by all interested parties."

Petitioner does not deny that it had full opportunity to be heard, and to interpose any explanation which it might have had for its conduct. Its present complaint that it was deprived of "due process" is dealt with hereafter, at page 30.

A further contention of the plaintiffs in the *American Insurance Company* cases was that the court could not act because the present superintendent of insurance, who had raised the question of fraud, had failed to restore to the custodian of the court that portion of the fund in question which had been received and disposed of by his office under the fraudulently stipulated decrees, and therefore had in effect ratified the decrees. This argument is closely analogous to petitioner's contentions based upon the failure of Root to participate in the recent proceedings before the Court of Appeals. In answering the argument, the court said (38 F. Supp. 926, at p. 935):

> "In these proceedings, the matter of 'unclean hands' is brought to our attention by the Motion for Citation. That motion set forth a situation of the grossest imposition upon this court through inducing entry of decrees upon an arrangement based upon bribery. In all movement thereafter, this court was acting not for the benefit or punishment of any party but to do whatever the law and the facts justified in vindicating its integrity as a court of justice. We must and did take the situation as it then was and therefrom worked out that vindication in the only way possible—by taking from those we thought legally responsible for this imposition all fruits of such action.
>
> "This court is not barred from doing this by failure of the Superintendent to restore or offer to restore the payments to the policyholders and the payments to him for expenses and attorneys' fees if the Court of Appeals of this Circuit is right, as we think it is, in stating 'that there is and can be no law or practice which would compel a * * * court to become a party to a fraud.' *Zeitinger* v. *Hargadine-McKittrick Dry Goods Co.*, 8 Cir., 244 F. 719, 722."

Petitioner rests its whole contention as to jurisdiction on the effect of Root's settlement and its inactivity in the fraud proceedings. But if the power of the court to vacate

a corrupt judgment could be defeated by a settlement, the door would be open to a successful defrauder to give the loser a generous settlement in order to shut off the means of nullifying his fraud, and he would then be largely free to use the corrupt judgment elsewhere with impunity. The consequence of the fraud would be made a means of shielding the fraud. In effect that is what Universal is attempting here, for certainly the settlement with Root was based on the fraudulent judgment, and yet Universal is relying on the settlement to defeat the court's power to get at the fraud. Even if the settlement were otherwise a barrier to judicial power, the court could treat it as a nullity because the settlement is itself touched with the fraud. It is inconceivable that a court would let its power to undo one effect of a fraud be defeated by another consequence of the fraud itself.

To summarize on this aspect of the situation, *i.e.*, the Court's jurisdiction to act regardless of Root's inaction:

A case or controversy never becomes moot so long as there remains pending and undisposed of therein an issue of such vital public interest as the integrity of the court itself—an issue which affects plaintiff's right to relief, and the kind of judgment which should be entered. *Cf. United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 309, 310.* Such an issue is that of unclean hands involving the bribery of a judge, and by its nature it can never become moot, for it is not dependent upon the ability or desire of a party litigant to assert it. The case or controversy known as *Universal Oil Products Company* v. *Root Refining Company* remained a case or controversy so long as the question of fraud therein remained undisposed of, no matter when it was discovered, for this affected the court's integrity,

*See also *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260, and cases there cited.

the validity of its judgments, and plaintiff's right to relief in the form of the ultimate judgment to be entered, regardless of Root's failure to raise the issue. Indeed, the court's interest in the question is enough in itself to make it justiciable—*i.e.*, to create a "controversy" in the Constitutional sense,—on which the court could enter an *in rem* judgment respecting the status of its former judgment.

(b) A Court of Appeals Has Equitable Jurisdiction to Entertain a Petition on Behalf of Those Adversely Affected by a Fraudulent Judgment Entered in That Court and to Afford Such Relief in the Premises as Right and Justice Require.—In this aspect of the situation, the *Hazel-Atlas* case is again controlling. In that case the defendant, in November, 1941, after judgment of the Court of Appeals, and after term had expired, brought a "bill of review proceeding" (322 U. S. 247) in the Court of Appeals to determine whether fraud had been perpetrated in that Court. This Court upheld jurisdiction of the Court of Appeals to determine the fact of fraud and to set aside its judgment.

In the instant proceeding, after judgments of the Court of Appeals, and after term had expired, seven corporations putatively bound by the *Root* judgments in other cases, brought like proceedings in the form of the petition of June 18, 1941,* (Vol. I, pp. 29-46), with the ultimate result that on June 15, 1944, the Court of Appeals recalled its mandates and vacated its judgments of June 26, 1935, as being tainted with fraud.

Thus, the only difference, in this respect, between the facts in the *Hazel-Atlas* case, and those in the instant case, is that in the former case the proceedings were initiated by

*The petition prays, *inter alia*, (Vol. I, p. 46) "that the Court make such other or further order in the premises, either in its own interest thereon, or for the benefit and relief of the petitioners, in respect of their collateral interests as set forth in Paragraphs V and VI herein as to the Court shall seem meet and proper."

the original defendant, whereas in the latter they were brought by defendants in other suits who were putatively bound by the judgments. It would seem absurd to suggest that where one party in a case is bound by a judgment therein, but having settled his case is unconcerned and takes no action to uncover a fraud, this circumstance should in itself be enough to deprive others who are subject to be bound to exactly the same extent—but who have made no settlement—of the right to prove once and for all, *in that case*, that the judgments with which they are threatened in their several cases are null and void because fraudulently obtained. To require that each defendant in these other suits should be obliged to prove Universal's fraud in each such suit, in order to escape the bar of the *Root* judgments, would be a negation of that "traditional flexibility" of equitable procedure, and an insistence upon that "cumbersome and dilatory procedure" respectively emphasized and condemned in the *Hazel-Atlas* case (322 U. S. 249).

That the steps taken by these companies, through their counsel, Messrs. Denison, Thiess, and von Holst, were not, in form, styled a bill of review, should not avoid or obscure recognition of the actual situation. Equity will always look through form to substance. *Young* v. *Higbee Co.*, (decided Feb. 26, 1945) ... U. S. ..., 89 L. Ed. Ad. Op. 578, 581. The original appearance before the Court of Appeals to suggest fraud was made by these attorneys expressly on behalf of those companies (*ante*, p. 8). The written petition and brief, filed by *amici curiae* to formally initiate the proceedings, named these companies, and set forth their interest in the *Root* case resulting from Universal's assertion of *res judicata* (*ante*, p. 9). These allegations were admitted in Universal's answer (*ante*, p. 9). The court's order of November 26, 1941, appointing the special master to conduct the investigation, im-

pliedly authorized the participation of these companies by its references to "parties interested" in the *Root* case (*ante*, p. 10). In proceedings before the master, Universal frequently characterized *amici curiae* as not being truly such, but as acting for the benefit of the private interests of their clients (*ante*, p. 11, footnote), and the master held that *amici curiae* were acting in part on behalf of their clients whose interests were adverse to those of Universal (*ante*, p. 11, footnote).

The appearance of counsel representing the seven companies, and the unquestioned fact that these lawyers had the laboring oar in the controversy, made their clients parties. *Drummond* v. *United States* (decided March 5, 1945) ... U. S. ... 89 L. Ed. Ad. Op. 647. Had Universal been vindicated, in the *Root* case, of the charge of fraud, no one could question that each of the seven companies would have been bound by the decision and estopped to assert the fraud in each of their several cases. *Souffront* v. *Compagnie des Sucreries*, 217 U. S. 475, 486-7.

That a bill of review may be brought by others than the original parties to a suit, provided that they show that their interests are adversely affected by the judgments, is established in *Freeman* v. *Howe*, 65 U. S. 450, 460. In *Root* v. *Woolworth*, 150 U. S. 401, 411, this Court quoted with approval from *Story's Equity Pleading*, Section 429, where the author says:

> "Sometimes such a bill [*i.e.*, of review] is exhibited by a person who was not a party, or who does not claim under any party to the original decree; but who claims in a similar interest, or who is unable to entertain the determination of his own rights, till the decree is carried into execution."

Viewing the fraud investigation in the *Root* case as being a bill of review proceeding similar to that presented in the *Hazel-Atlas* case, Universal's whole contention as to

an alleged lack of a "case or controversy" within the meaning of the Constitution at once disappears. The controversy was between Universal and those whom it was seeking to subject to the *Root* judgments. A very real issue, that of fraud practiced upon the Court of Appeals in 1935, was strenuously litigated between opposing counsel representing distinct clients with completely antagonistic interests. The determination of that issue was one upon which the court could, and did, act judicially, in a case or controversy then before it, to set aside its former void judgments. All constitutional prerequisites for judicial action were thus present.

In this view of the matter the court's jurisdiction to entertain a bill of review proceeding filed by non-parties to the original suit may be regarded either as original jurisdiction in aid of, or as ancillary to, its unquestioned appellate jurisdiction over the *Root* case. Circuit courts of appeals have all such original jurisdiction as is necessary to aid, protect or enforce their appellate jurisdiction. *United States* v. *Mayer*, 235 U. S. 55, 65, 66; *Whitney* v. *Dick*, 202 U. S. 132, 137; *Frankel* v. *Woodrough*, 7 F. (2d) 796 (C. C. A. 8); *Hall* v. *United States*, 78 F. (2d) 168, 170 (C. C. A. 10). The doctrine of ancillary jurisdiction is also well established by the authorities, *e.g.*, *Freeman* v. *Howe, et al.*, 65 U. S. 450, 460; *Root* v. *Woolworth*, 150 U. S. 401, 411; *Dickey* v. *Turner*, 49 F. (2d) 999 (C. C. A. 6); *Osborn* v. *Michigan Air Line R. Co.* (C. C. E. D. Mich.), 18 Fed. Cas. 844; *Woodbury, et al.* v. *Andrew Jergens Co., et al.*, 69 F. (2d) 49 (C. C. A. 2).

In *Compton* v. *Jesup*, 68 Fed. 263, 279 (C. C. A. 6) the late Chief Justice Taft, then Circuit Judge, said:

> "* * * every court has inherent equitable power to prevent its own process from working injustice to any one, and may entertain a petition by the aggrieved

person, either in the form of a simple motion, or by intervention pro interesse suo* in the cause in which the process issued, or by ancillary or dependent bill in equity, and may afford such relief as right and justice require.' The existence of such a power, independent of statutory jurisdiction, is recognized by the supreme court in *Freeman* v. *Howe*, 24 How. 450; *Minnesota Co.* v. *St. Paul Co.*, 2 Wall., 609-633; *Railroad Co.* v. *Chamberlain*, 6 Wall. 748; *Krippendorf* v. *Hyde*, 110 U. S. 276, 4 Sup. Ct. 27; *Pacific R. Co. of Missouri* v. *Missouri Pac. Ry. Co.*, 111 U. S. 505, 4 Sup. Ct. 583; *Stewart* v. *Dunham*, 115 U. S. 61, 5 Sup. Ct. 1163; *Phelps* v. *Oaks*, 117 U. S. 236, 6 Sup. Ct. 714; *Dewey* v. *Coal Co.*, 123 U. S. 329, 8 Sup. Ct. 148; *Gumbel* v. *Pitkin*, 124 U. S. 131, 8 Sup. Ct. 379; *Johnson* v. *Christian*, 125 U. S. 642-646, 8 Sup. Ct. 989, 1135; *Morgan's L. & T. Railroad & Steamship Co.* v. *Texas Cent. Ry. Co.*, 137 U. S. 171, 11 Sup. Ct. 61."

While the *Hazel-Atlas* case amply supports the authority of the Court of Appeals to directly pass upon the issue of fraud rather than to require proceedings in the District Court, it should be noted that the instant case differs from the *Hazel-Atlas* case in that here the fraud was shown by the presentation of oral testimony before a special master with full opportunity in Universal, the accused party, to

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*Petitioner is in error in stating (Brief, p. 38) that the seven refining companies "could not become parties even as intervenors" merely because they had always denied being bound by the *Root* judgments. Petitioner had always contended that these companies were bound, and it was initially successful in its contention (*ante*, p. 6). This contention gave these companies a definite legal interest in the *Root* case, which under *Compton* v. *Jesup*, *supra*, gave them the right to intervene "*pro interesse suo*." It also gave them the right under Rule 24(a) of the Federal Rules of Civil Procedure, for the second ground of intervention authorized by this Rule is " . . . when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." 28 U. S. C. A. foll. Sec. 723(c).

cross-examine and to produce evidence on its own behalf. In proceeding in this manner the Court of Appeals was acting under the authority of the decisions of this Court in *Dakota County* v. *Glidden*, 113 U. S. 222, at pp. 225-6; and *American Wood Paper Co.* v. *Heft*, 131 U. S. Appendix xcii, which were cited in the brief of *amici curiae* in support of their original petition (Vol. I, p. 51).

The Court of Appeals Properly Taxed Fees and Expenses As Costs Against Petitioner.

The Court of Appeals, having power and jurisdiction to conduct the fraud investigation, had ample authority to implement itself by the appointment of a master and of *amici curiae* to assist therein* and to tax reasonable compensation of the master and of *amici curiae* against petitioner. In *Ex parte Peterson*, 253 U. S. 300, this Court affirmed the "inherent power" of courts to provide themselves with "appropriate instruments" such as special masters and auditors to aid in the performance of their judicial duties and to tax the compensation and expense of such assistants as costs. No tenable distinction exists between the appointment of an auditor as in the *Peterson* case, and the appointment of *amici curiae* in the case at bar. *In re Utilities Power & Light Corporation*, 90 F. (2d) 798, 800 (C. C. A. 7); *In re The St. Louis Institute of Christian Science*, 27 Mo. App. 633, 641.

Thus the allowance made in the order sought to be reviewed in the instant case is fully justified when *amici*

*In the *Root* case, *amici curiae* were called upon throughout to act as special investigators and prosecutors to run down clews, unearth and present evidence, examine witnesses, prepare briefs, and present arguments. These services were much more diversified than the services ordinarily required of *amici curiae* in the preparation of a single brief, or in the participation in an argument on behalf of someone interested in a legal question arising in litigation, as in *W. J. Lake & Co.* v. *King County*, 104 P. (2d) 599 and *Kraus* v. *State*, 169 N. W. 3, cited by petitioner (Brief, p. 42).

curiae are considered in their aspect as friends of the Court. Moreover, it is also fully justified when they are viewed solely as attorneys acting on behalf of the private interests of their clients. These clients bore the entire initial expense of the investigation, including the compensation of the master and of their counsel, who appeared as *amici curiae*. The circumstances underlying the cause and development of this investigation urgently require reimbursement to these companies by the imposition of this expense upon at least one of the parties whose fraudulent, and indeed, criminal, conduct has necessitated that it be incurred.

The lack of any exact precedent for such relief does not presuppose any lack of power in the courts to award it, but merely reflects the fortunate infrequency of the pernicious form of fraud here disclosed. In *Sprague* v. *Ticonic National Bank et al.*, 307 U. S. 161, this Court upheld "the power of Federal courts in equity suits to allow counsel fees and other expenses entailed by the litigation not included in the ordinary taxable costs recognized by statute." In the course of the opinion Mr. Justice Frankfurter stated (p. 166):

> "Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation. * * * As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility."

The facts in the *Sprague* case are distinguishable from those at bar in that the litigation in effect created a fund in which other parties were interested. However, the later decision of this Court, in *Reconstruction Finance Corpora-*

tion v. *Menihan Corporation, et al.*, 312 U. S. 81, recognized the power of courts of equity to make an additional allowance of costs to a party, including attorney's fees, in a case where no fund was involved. Accordingly, the order of the Court of Appeals which petitioner seeks to have reviewed is not in conflict with the governing decisions of this Court. On the contrary it is fully supported thereby, and operates to achieve a result which is dictated by dominating requirements of justice.

In the nature of things it is an expensive business to uncover fraud, and any doctrine that a court is powerless to impose costs on the party guilty of the fraud would furnish a safe haven for future wrongdoers. The converse is, of course, also true. The knowledge of a party litigant disposed to take short cuts that he will be mulcted with all the expenses incurred in exposing his contemplated offense is the surest deterrent to malefactors of the type to whom ethical considerations are meaningless.

Petitioner Was Accorded a Full and Fair Hearing on the Issue of Its Fraud.

Only one other question remains, namely, petitioner's contention that the fraud proceedings were conducted in disregard of the established rules of evidence whereby petitioner claims it was deprived of its property without due process of law (Pet., p. 29, Point 6).

A sufficient answer to this contention is that petitioner wholly failed to make any objection, or to take any exception, on this ground when it filed its one hundred and sixty-five objections and exceptions (Vol. VIII, pp. 3615-37), to the report of the special master. So long as petitioner hoped for vindication on the merits, it was satisfied with the record. It only complains now that it is under order

to pay $154,606.57 as costs and expenses. The result, of course, is that even if petitioner once had a valid ground of objection, it has now waived it.

Furthermore, even though the master had received incompetent evidence (which we deny), petitioner may not ask a review of such matters in these proceedings. Its petition is directed to the Court of Appeals' order of December 29, 1944—not to the order of June 15, 1944. The latter order is conclusive as to the finding of fraud and as to the competency of the testimony supporting that finding. Had petitioner intended to question either point it should have applied for a writ of certiorari within ninety days of the order of June 15, 1944. Because jurisdiction of a court over the subject matter of a judicial proceeding may never be waived, petitioner may raise that issue even on a petition for the review of an order awarding costs. But if there was, as we have shown to be the fact, a justiciable case or controversy with adversary parties before the master, then it is too late for petitioner to complain to this Court of rulings on evidence in a proceeding which was finally determined in June, 1944. In reality, petitioner can assert only one ground for relief in this Court—that the Court of Appeals had no power or jurisdiction to try and determine the fact of one of the most sordid and flagrant frauds ever perpetrated in judicial history.

But, as a matter of fact, the master exercised extreme caution in ruling on evidence. In preparing his final report he excluded material which, in our judgment, should have remained in the case. Instances are his exclusion of the deceased Referee Steedle's diary kept by him in line of his duty when Morgan S. Kaufman and Judge J. Warren Davis were attempting to influence Steedle to act favorably to William Fox in his bankruptcy matters (Vol. VIII, p. 3531); the exclusion of the stipulated testimony of one of

Davis's fellow judges regarding a remark made to him by Davis revelatory of a corrupt mind (Vol. VIII, p. 3519); the exclusion of Steedle's widow's testimony of her husband's remarks when called to the telephone by Davis and of Steedle's secretary's testimony as to Steedle's remark when visited by Kaufman (Vol. VIII, p. 3531)—testimony which was thought competent as part of the *res gestae*. During the course of the hearings, the master repeatedly ruled on evidence, and frequently sustained petitioner's objections thereto. In the absence of any specific ruling complained of, it is, of course, impossible to show in detail the absence of error. It is sufficient to note that petitioner nowhere disputes that the finding of fraud was based on competent and relevant evidence. It is apparent from a reading of the master's report (Vol. VIII, p. 3516 et seq.) that, quite apart from the matters of which petitioner makes such belated complaint, petitioner's flagrant fraud is otherwise fully established by ample and competent proof. Certainly, in the present proceedings, the presumption is that only such evidence was considered by the master in arriving at his decision, and by the court in affirming it.

CONCLUSION.

We have shown that the fraud proceedings were conducted in a case or controversy pending before the Court of Appeals, that they were adversary in character, with full opportunity afforded petitioner to cross-examine witnesses and to adduce testimony, that the allowance of fees and expenses was in harmony with the decisions of this Court, and that the Court of Appeals' jurisdiction rests on well-established principles of law. As no new question

presented requiring a review by this Court, we respectfully submit that the Petition for Certiorari should be denied.

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pro se, and on behalf of
Skelly Oil Company,
Globe Oil & Refining Company (of Illinois),
Eldorado Refining Company,
Globe Oil & Refining Company (of Kansas),
Rock Island Refining Company, and
Anderson Prichard Oil Company.

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